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NOTES

INSANITY AS A DEFENSE IN DIVORCE ACTIONS

The courts of Pennsylvania have held uniformly that insanity is not ground for divorce.[1] It is equally well settled that insanity cannot be a defense to a libel in divorce, unless the respondent was insane at the time of the commission of the act which is the ground for divorce.[2] But any discussion of the foregoing problems is certain to raise several questions which have not found definite answers in the Pennsylvania decisions. Is insanity at the time of the commission of the act of divorce a good defense to a libel in divorce? Is partial insanity a defense to a libel in divorce? Will the law undertake to distinguish

[1]Mintz v. Mintz, 83 Pa. Super. 85. The Act of April 18, 1905, P.L. 211, amending Act of April 13, 1843, P.L. 233, does not make insanity a new ground for divorce, but, so far as the Act is related to the subject of divorce, regulates procedure only.
[2]Benjeski v. Benjeski, 150 Pa. Super. 57; Kolesar v. Kolesar, 28 Dist. 305; 3 Temple L.Q. 202 (1929).

among various degrees of lack of control short of insanity and select those which will prevent a divorce and those which will not? The answers to these questions will be the scope of this paper.

INSANITY AS A DEFENSE

A. Adultery

Insanity has long been a good defense to a criminal charge of adultery,[3] and it would seem to follow that it would likewise be a good defense to the less serious civil charge in a divorce libel. However, the views of the Pennsylvania courts have been far from conventional. To best understand their decisions, we must look at the reasons behind them.

In the early English cases[4] adultery was considered more a social offense than a moral one. The offense was deemed more serious when committed by the wife than when committed by the husband; thus, a husband was able to bring a successful action for divorce in this instance, but the wife had no such right. This theory was based upon the proposition that adultery on the part of the wife tended to bring illegitimate offspring into the household, while a similar offense by the husband had no such grievous results. Little or no consideration was given to the wrong done to the wife through defilement of the marriage bed when the husband committed adultery.

So great was the influence of this reasoning that the Supreme Court of Pennsylvania adopted it at its earliest opportunity.[5] In the famous case of *Matchin v. Matchin,*[6] Mr. Chief Justice Gibson said:

> "A wife's insanity, though so absolute as to have effaced from her mind the first lines of conjugal duty, would not be a defense to a libel for adultery, though it would be a defense to an indictment for it. The offense is a social as well as a moral one; and it is agreed by the civilians to be less grievous to the sufferer, though not less immoral, when it is committed by the husband, whose transgressions cannot impose supposititious offspring on the wife, than it is when committed by the wife, whose trangression may impose such offspring on the husband. . . . We are nevertheless at liberty to conclude that insanity may be a bar to divorce at the wife, when it would not, in similar circumstances, be a bar to divorce at suit of the husband. To say the least, adultery committed under the irresistible im-

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[3]Hitchler, CRIMINAL LAW, p. 132.
[4]7 Mew's English Case Law 735; *see also* Yarrow v. Yarrow, (1892) Probate L.R. 92.
[5]Sturgeon, PENNA. LAW AND PROCEDURE IN DIVORCE, 2nd Ed.; Klein, p. 226.
[6]6 Pa. 332, 47 Am. Dec. 466 (1847).

> pulse of that morbid activity of the sexual propensity which is called *nymphomania,* or more recently, *erotic mania,* would certainly be a ground of divorce, though not of indictment. The great end of matrimony is not the comfort and convenience of the immediate parties, though these are necessarily embarked in it; the procreation of progeny having a legal title to maintenance by the father, and the reciprocal taking for better, for worse, for richer, for poorer, in sickness and in health, to love and cherish till death, are important, but only modal conditions of the contract and no more than ancillary to the principal purpose of it. The civil rights created by them may be forfeited by the misconduct of either party; but though the forfeiture can be incurred, so far as the parties themselves are concerned, only by a responsible agent, it follows not that those rights must not give way without it to public policy, and the paramount purpose of the marriage — the procreation and protection of legitimate children, the institution of families, and the creation on natural relations among mankind, from which proceed all the civilization, virtue, and happiness to be found in the world. The absurdity of the dogma, that marriage is a sacrament, and dissoluble only by the head of the church, instead of a political status subject to the power of the state, is manifest."

Close examination of this case shows that the views of Mr. Chief Justice Gibson were only *dicta* and that the decision in the case was based upon other issues.[7] Nevertheless, this opinion met with almost unanimous disapproval in other states.[8]

The courts of Vermont were particularly emphatic in saying:

> "We have read the case of *Matchin v. Matchin,* supra, and the opinion of the late Chief Justice Gibson, where he attempts to maintain that the adultery of the wife, although insane, is sufficient ground for divorce, for the reason that it tends to impose spurious offspring upon the husband. The reason is one which will have no application to similar acts committed by the husband, and, as applied to the wife, seems truly revolting to all just sense of propriety and decency. We are surprised that such opinion should ever have found admission into the reports, and should be shocked at the prospect that it could ever gain general countenance in the American republic".[9]

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[7]*See* Matchin v. Matchin, *supra,* at p. 337. "So far I have treated the subject as if the evidence made out a case of moral insanity, though, in point of legal effect, it does not."

[8]*See* Annotation, 42 A.L.R. 1531.

[9]Nichols v. Nichols, 31 Vt. 328, 73 Am. Dec. 352, (1858).

Despite the obvious unfairness of the opinion and the host of out-of-state criticisms, Pennsylvania courts have been reluctant to overule *Matchin v. Matchin*,[10] and this decision, unapproved and much maligned, is still cited as a Pennsylvania authority.[11]

How would this question be decided in Pennsylvania to-day? Would insanity be allowed as a defense to a libel in divorce based upon adultery? Analagous to the crime of adultery is the tort of criminal conversation. Earliest decisions in trials for criminal conversation were motivated by theories similar to those affecting the decisions in cases of adultery.[12] The possibility of bringing illegitimate children into the household was the paramount question and the husband was allowed an action for criminal conversation when another had illicit sexual intercourse with his wife, while the wife was not allowed a similar action against one who had sexual intercourse with her husband.

Today, modern legislation recognizes the equal rights and obligations of husband and wife[13] and a wife is allowed to sue for torts committed against her legally protected marital interests.[14] Just as the husband is given a cause of action based upon the possibility of illegitimate offspring being introduced into his household, the wife is given a cause of action based upon the defilement of the marriage bed, the breach of exclusive right to marital intercourse, and upon the possibility of physical contamination to herself and to future legitimate offspring.[15]

Mr. Chief Justice Gibson's opinion was influenced by the unequal status of husband and wife in the effect on the household of adultery by one of the spouses. Today, there is little doubt that the wife is equally wronged by adultery committed by her husband. Even though his adulterous acts do not threaten the household with illegitimate offspring, they do expose future legitimate offspring of the marriage to disease and physical contamination. There is little doubt that *Matchin v. Matchin*[16] would not be followed in a similar case arising under present conditions. To allow the husband to obtain a divorce from his wife on the basis of acts committed while she was insane is altogether repulsive to modern legal thought. That the courts will overrule *Matchin v. Matchin*[17] at the earliest opportunity is somewhat indicated in a quotation from *Hansell v. Hansell*[18] where the Court, in discussing the *Matchin* case, said:

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[10]*Supra.*
[11]Williams v. Williams, 24 Del. Co. 465.
[12]3 BL. COMM. 139 (Lewis' Ed., 1902).
[13]48 PS 111.
[14]71 U. OF PA. LAW REV. 395; 4 A.L.R. 569, 28 A.L.R. 327.
[15]Madden, PERSONS AND DOMESTIC RELATIONS, p. 177.
[16]*Supra.*
[17]*Supra.*
[18]3 Dist. 724.

> "Without now expressing an opinion whether that decision would be sustained by the spirit and tendency of later jurisprudence, it may be said that the decision excluded altogether the question of intention or will and was based entirely on the effect of the act in casting doubt upon the legitimacy of offspring and the Judge strongly intimated that the decision might have been different if the husband had been the guilty party."

B. Desertion

The Divorce Law of Pennsylvania[19] states that desertion is a ground for divorce if a spouse "shall have committed wilful and malicious desertion, and absence from the habitation of the injured and innocent spouse, without a reasonable cause, for and during the space of two years." Since the desertion must be "wilful and malicious", there is little doubt that a person, insane at the time of desertion, is incapable of "wilfully and maliciously" deserting his spouse, and that such insanity at the time of the commission of the act of divorce would be a complete defense to an action of divorce brought by the injured spouse.[20]

This rule will apply not only to those cases where the respondent was insane at the time of the desertion, but also to those cases in which the respondent became insane within two years after the desertion. The courts have held that subsequent insanity of the deserter within the two year period nullifies the requisite mental element and changes the desertion to mere separation. Judge Orlady, in *Little v. Little*,[21] ruled as follows:

> "From the date of the committment of the respondent as an insane person, he could not be held to be persisting in a wilful and malicious desertion, because he was not only irresponsible for his acts, but was deprived of exercising a wilful act. Separation is not desertion. Desertion is an actual abandonment of matrimonial cohabitation, with an intent to desert, wilfully and maliciously persisted in, without cause, for two years. The guilty intent is manifested when, without cause or consent, either party withdraws from the residence of the other party: *Ingersoll v. Ingersoll*, 49 Pa. 251. This refers to the inception of the desertion, but it is clear that, under our statute, it must be wilfully and maliciously persisted in for two years, in order to entitle the libellant to a divorce on ground of desertion."

It is interesting to note that, in *Little v. Little*,[22] the respondent was committed to a hospital for the insane two years and seven days after his original desertion, having wilfully and maliciously persisted in the act of desertion for

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[19]Act of May 2, 1929, P.L. 1237; 23 PS 10.

[20]Freedman, LAW OF MARRIAGE AND DIVORCE IN PENNA., p. 648.

[21]56 Pa. Super. 419, 420. See also Mann v. Mann, 14 D.&C. 303 and Commonwealth v. Stevens, 25 Pa. C.C. 68.

[22]*Ibid.*

the requisite two year period. Therefore, a divorce was granted to the libellant, but it is clear from the opinion that if the insanity had occurred within the two year period, the insanity would have been a complete defense to the libel in divorce and the divorce would not have been granted.[23]

C. Cruelty and Indignities

A divorce will be granted in Pennsylvania if the libellant can prove that the respondent "shall have, by cruel and barbarous treatment, endangered the life of the injured and innocent spouse"; or "shall have offered such indignities to the person of the injured and innocent spouse, as to render his or her condition intolerable and life burdensome." These two grounds for divorce are usually found together and, for our purposes, can be discussed as one.

The courts have rightfully held that these acts of divorce must be committed wilfully and intentionally, and that if any condition is present to destroy the requisite mental element, the acts of the respondent, even though amounting to cruel and barbarous treatment and indignities to the person, will not be grounds for divorce. This view was ably presented in *Hansell v. Hansell*,[24] where Judge Gordon stated:

> "The evil and malicious will must be present to constitute an act cruel and barbarous and an insulting intent to make it an indignity. Accidental acts, no matter how injurious, would not be sufficient, for the wrongful intent would be absent. For this reason, therefore, insanity would also deprive the conduct of the element of wilful purpose necessary to sustain the statutory cause of divorce."

That insanity at the time of the commission of the cruelties and indignities will be a complete defense to a libel in divorce founded upon these grounds is conclusively held in a recent Pennsylvania Superior Court case, *Benjeski v. Benjeski*.[25] Here, the respondent developed a well known form of insanity and uncontradicted testimony was given by a competent physician that the emotional instability of the respondent and her conduct upon which the libellant relied as ground for divorce were attributable to the disease. Judge Kenworthey affirmed the decree of the lower court dismissing the libel.

Insanity as a defense to a libel in divorce charging cruelty and indignities differs from the defense to a similar libel charging desertion in that the respondent must be shown to have been insane at the time of the commission of the act. We have seen that insanity of the respondent within two years after the initial desertion will nullify the requisite mental element and change

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[23]For a general discussion of this problem, *see* 4 A.L.R. 1333.
[24]*Supra. See also,* Fritzinger v. Fritzinger, 5 Kulp 507.
[25]Benjeski v. Benjeski, 150 Pa. Super. 57.

the desertion to a mere separation. In using the defense of insanity to a charge of cruelty and indignities, the respondent must be shown to have been insane at the time of the commission of the acts. Insanity which antedates the acts will not be a defense to them and a divorce will be granted.[26]

Where a husband, by cruel and barbarous treatment and indignities to her person, forced his wife to withdraw from the home, and he afterwards became insane, his insanity in no way affected the wife's right to a divorce.[27] Where evidence showed that a wife was guilty of cruelty, the husband was not deprived of the effect of such evidence by proof that the wife was incipiently insane when the several acts occurred and later did become insane.[28]

It may be well to note here that in those cases wherein the respondent to a divorce libel becomes insane after the commission of the act of divorce and is *non compos mentis* when the libel in divorce is filed, the court of Common Pleas will have jurisdiction to receive the petition and proceedings will be the same as in other proceedings in divorce.[29]

PARTIAL INSANITY AS A DEFENSE

Thus far, we have made no attempt to define or qualify the term "insanity". It is quite clear that general insanity, i.e., such loss of control of mental facilities as to render the respondent an unaccountable being, will be a complete defense to a libel in divorce. In cases of general insanity, the test is the power or capacity of the person to distinguish between right and wrong in reference to the particular act in question.[30]

But suppose that the respondent was suffering from partial insanity at the time of the commission of the act? Suppose that he is insane on one particular point, but is a responsible being on all others?[31] Would such impairment of mentality render him immune to proceedings in divorce?

This defense is one which frequently has been raised in our criminal courts, but which has been comparatively rare as a defense in divorce actions. The discussion of Mr. Chief Justice Gibson in *Commonwealth v. Mosler*[32] has long been considered classic on this point and has been cited favorably and without exception:

> "A man may be mad on all subjects; and then, though he have glimmerings of reason, he is not a responsible agent. This

[26]McDermott v. McDermott, 47 Pa. C.C. 151.
[27]Kolesar v. Kolesar, 28 Dist. 305.
[28]Remsch v. Remsch, 13 D.&C. 373.
[29]Act of May 2, 1929, P.L. 1237, Sec. 18, 25.
[30]Sayres v. Commonwealth, 88 Pa. 291, 298.
[31]32 C.J. 601.
[32]4 Pa. 264.

> is general insanity; but if it be not so great in its extent or degree to blind him to the nature and consequences of his moral duty, it is no defense to an accusation of crime. It must be so great as to entirely destroy his perception of right and wrong; and it is not until that perception is thus destroyed that he ceases to be responsible. It must amount to delusion or hallucination, controlling his will and making the commission of the act, in his apprehension, a duty of overruling necessity. The most apt illustration of the latter is the perverted sense of religious obligation which has caused men to sacrifice their wives and children. Partial insanity is confined to a particular subject, the man being sane on every other. In that species of madness, it is plain that he is a responsible agent if he were not instigated by his madness to perpetrate the act. He continues to be a legitimate subject of punishment, although he may have been labouring under a moral obliquity of perception, as much so as if he were merely labouring under an obliquity of vision. A man whose mind squints, unless impelled to crime by this overt mental obliquity, is as much amenable to punishment as one whose eye squints. On this point, there has been a mistake, as melancholy as it is popular. It has been announced by learned doctors, that if a man has the least taint of insanity entering into his mental structure, it discharges him of all responsibility to the laws. To this monstrous error can be traced the fecundity in homicides, which has dishonoured this country, and the immunity that has attended them. The law is, that whether the insanity be general or partial, the degree of it must be so great as to have controlled the will of its subject and to have taken from him the freedom of moral action."

If partial insanity has thus been recognized as a valid defense to a criminal charge where it can be shown that the degree of insanity was "so great as to have controlled the will of its subject and to have taken from him the freedom of moral action", should it not follow that partial insanity to a similar degree should be a complete defense to a libel in divorce? A spouse, sane in all other respects, may be suffering from *erotomania.* Should adultery committed while under the influence of this mental disorder be a ground for a divorce action against that spouse? To grant a divorce in such an instance would be to indirectly allow a divorce grounded upon insanity of the respondent, a policy long condemned in Pennsylvania.

The line distinguishing between a party partially insane and one who is responsible for his acts is often a difficult one to draw. In *Remsch v. Remsch,*[33] the husband sued for divorce on the ground of cruel and barbarous treatment. It was shown, as a defense, that the wife was "incipiently insane" when the several acts of cruelty were committed. The court granted the divorce, holding

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[33] *Supra.*

that the wife was responsible for these acts which were grounds for divorce. Several out-of-state decisions have held that "mental irresponsibility is not sufficient if the respondent comprehended his ways".[34] Another case granted a divorce against a person afflicted with *paranoia* at the time of the commission of the acts of divorce.[35]

In *Benjeski v. Benjeski*,[36] a very recent case, the Pennsylvania Superior Court cited with apparent approval a doctrine set forth in a Maryland case[37] to the effect that "the law does not undertake to distinguish among the various degrees of lack of control short of insanity and select those which prevent a divorce and those which do not." But a complete reading of this opinion would seem to indicate that the Pennsylvania courts would consider partial insanity as a defense, or at least, as a major factor in the final decision upon the libel.

Although the tests advocated by Justice Gibson in *Commonwealth v. Mosler*[38] could be applied to insanity in divorce actions as well as to insanity in criminal cases, a Common Pleas court decision in *Thomas v. Thomas*[39] has ably and clearly stated the test applicable to insanity, whether it be general or special, when such insanity is used as a defense in divorce actions. The Court stated as follows:

> "The test in such cases is whether, at the time the acts were committed the respondent was in such a mental condition as to deprive him of the use of his reason to the extent that he did not know right from wrong and was incapable of willing the one or the other."

JOHN H. HIBBARD

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[34]214 N.W. 133; 129 A. 122.
[35]Dochelli v. Dochelli, 6 A. (2nd) 475.
[36]*Supra.*
[37]Kruse v. Kruse, 179 Md. 657, 22 A. (2nd) 475.
[38]*Supra.*
[39]19 Lehigh L.J. 45.